IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 318.

THE UNITED STATES OF AMERICA,
Respondent,

against

SOUTH BUFFALO RAILWAY COMPANY,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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September 27, 1948.

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STATUTES AND RULES

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, South Buffalo Railway (hereinafter sometimes called South Buffalo) respectfully prays that a writ of certiorari be issued to review a judgment of the United States Circuit Court of Appeals for the Second Circuit (now the United States Court of Appeals for the Second Circuit), entered June 30, 1948, reversing a judgment of the District Court of the United States for the Western District of New York entered June 10, 1947, which dismissed the Third and Sixth causes of action set forth in the complaint of the respondent herein. A certified transcript of the record in this case, including proceedings in said Circuit Court of Appeals, has been furnished in accordance with Rule 38, par. 1 of the Rules of this Court.

The Opinions of the Courts Below

The opinion of the District Court is reported at 71 F. Supp. 461. The opinion of the Circuit Court of Appeals is reported at 168 F. (2d) 948.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, United States Code §§ 1254(1) and 2101(c). The date of the judgment of the Circuit Court of Appeals to be reviewed is June 30, 1948.

Statement

The petitioner operates a switching railroad situated entirely within the Buffalo Switching District in the State of New York. This action was instituted to collect penalties for alleged violations of the Safety Appliance Act. The complaint stated ten causes of action. Eight of the causes of action, which were based upon allegations that the petitioner hauled cars on its line with defective safety appliances (other than air brakes*), were settled prior to trial and severed from the two remaining causes of action. Each of the remaining two causes of action (the Third and Sixth), was based upon an allegation that, in violation of the provisions of the United States Code, Title 45, Sections 1 to 10, inclusive, as modified by an order of the Interstate Commerce Commission dated June 6, 1910, the petitioner operated a train on its line of railroad "when less than 85

*Such as bent sill-steps and bent hand-holds.

per cent of the cars which composed said train had their brakes used and operated by the engineer of said locomotive engine drawing said train." Those provisions of Title 45, as modified by the I. C. C. order, are commonly known as the air-brake provisions of the Safety Appliance Act.

After a trial without a jury the District Court dismissed the Third and Sixth causes of action on the merits on the ground that the movements complained of in such causes of action were switching movements rather than train movements and, therefore, were not subject to the provisions of the Safety Appliance Act.

In taking that action the District Court was following the decisions of this Court that the air-brake provisions of the Safety Appliance Act (hereinafter sometimes called the Act) do not apply to switching movements as distinguished from train movements. Respondent has conceded (R. 16) that the Act does not apply to switching movements.

The Circuit Court reversed the judgment of the District Court and held that the movements in question were train movements rather than switching movements.

The Statute Involved

The pertinent provisions of Title 45 are as follows:

> "9. *Number of cars to be operated with power or train brakes; increase of number*—Whenever, * * * any train is operated with power or train brakes not less than 50 per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said 50 per centum shall

> have their brakes so used and operated; and, to more fully carry into effect the objects of said sections, the Interstate Commerce Commission may, from time to time after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirement of the said Interstate Commerce Commission shall be subject to the like penalty as failure to comply with any requirement of this section."

Pursuant to the authority granted to it by Section 9, above quoted, the Commission made the above-mentioned order dated June 6, 1910, requiring that

> "* * * whenever * * * any train is operated with power or train brakes, not less than 85 percent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-brake cars in every such train which are associated together with the 85 percent shall have their brakes so used and operated."

Question Presented and Reasons for Granting Writ

The question presented is whether either or both of the movements complained of in the said Third and Sixth causes of action were train movements rather than switching movements and therefore subject to the provisions of the United States Code, Title 45, Sections 1 to 10, inclusive, as modified by an order of the Interstate Commerce Commission dated June 6, 1910. In holding that they were train movements, the court below rendered a decision on a federal

question which appears to be in conflict with applicable decisions of other Circuit Courts. *United States* v. *Great Northern R. Co.*, 73 F. (2d) 736 (C. C. A. 9th, 1934); *United States* v. *New York, Chicago and St. Louis Railway Company*, 77 F. (2d) 215 (C. C. A. 7th, 1935); *United States* v. *Texas & New Orleans Railroad Company*, 13 F. (2d) 429 (D. C. S. D. Tex. 1926).

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Court of Appeals for the Second Circuit, sitting at New York, N. Y., commanding said court to certify and send up to this Court, on a date to be designated, a full and complete transcript of the record and of all proceedings in the Circuit Court of Appeals in this case, to the end that this case may be reviewed and determined by this Court; that the judgment of said Circuit Court of Appeals be reversed; and that your petitioner be granted such other and further relief as may seem proper.

South Buffalo Railway Company,

by Bruce Bromley,
Counsel for Petitioner.

Hoyt A. Moore,
Frank M. McGarry,
of Counsel.

September 27, 1948.

BRIEF IN SUPPORT OF PETITION

Specification of Errors

The Circuit Court of Appeals erred:

In holding that the movements complained of in the Third and Sixth causes of action in the complaint in this case were train movements rather than switching movements and therefore subject to the provisions of the United States Code, Title 45, Sections 1 to 10, inclusive, as modified by an order of the Interstate Commerce Commission dated June 6, 1910 (hereinafter referred to as the Act).

ARGUMENT

Introductory

A complete understanding of the facts underlying the Trial Court's conclusion is necessary to an understanding of the question presented. Those facts as found by the Trial Court and accepted by the Circuit Court are as follows.

Petitioner owns and operates a switching railroad situated wholly within the Buffalo Switching District in the County of Erie, State of New York.

It performs switching for various industries located on its lines both between and within the plants of such industries, respectively, and also performs terminal switching between such industries and the trunk line railroads with which it connects.

It is situated and operates entirely within a strip of land which is less than 6 miles in length and three

miles in width. It owns and operates approximately 87 miles of track.

It does not perform any services other than switching services. Its equipment is appropriate only for such services. None of its equipment and none of its operating personnel passes beyond or does any work for it beyond the limits of its own property. It is classified by the Interstate Commerce Commission for accounting practices as a carrier the operations of which are exclusively switching.

Petitioner's entire system of trackage is operated as a single yard; it does not have any yard limits or yard limit boards. All of its crews are yard crews and are paid rates of pay for yard switching services.

Through trains do not pass over its tracks. It does not operate any passenger service. All movements on its tracks are effected through the use of switching locomotives and are under the supervision and control of yardmasters and crews. None of its movements is made under train orders or on time-table schedules. Markers are not used on any movement and there is no movement which has rights superior to those of any other movement. It does not have any block signal system and all of its movements are made under operating control, by which is meant that each of such movements is made at slow speeds with a member of the crew stationed at the forward end of the locomotive so that he can see sufficiently far ahead to enable the movement to be brought to a stop within one-half of the range of his vision.

Petitioner does not have any station nor does it have a main line. All of its tracks are used for and devoted to switching operations.

The operating revenue collected by it is classified by the Interstate Commerce Commission as revenue from switching and its tariffs on file with the Interstate Commerce Commission and the Public Service Commission of the State of New York describe the rates charged for its services as switching charges.

Its accounts are kept in the manner prescribed by the Interstate Commerce Commission for switching railroads. All of its operating income and expense is, at the express direction of the Interstate Commerce Commission, classified as switching income and expense.

The movement performed by petitioner which is referred to in the Third cause of action of the complaint herein was made on December 4, 1944, by a diesel electric switching locomotive and 15 cars from tracks adjacent to the plant of Buffalo Sintering Company to a point commonly referred to as the North Yard of the petitioner, a distance of slightly less than 2 miles. That locomotive was equipped with power-driven wheel brakes and appliances for operating a train brake system. Less than 85% of such cars had air brakes used and operated by the locomotive engineer. Said movement was made at an average speed of approximately 5 miles an hour; no public streets, highways or tracks of other railroads were travelled upon or crossed at grade and visibility along the entire route was unobstructed.

The movement described in the preceding paragraph was a part of a switching movement made of those 15 cars, for which petitioner was paid one switching charge per car. Such 15 cars were assembled by it from various points in the plant of Buffalo Sinter-

ing Company and moved slightly less than two miles to a point commonly referred to as the North Yard where 5 of them were cut out and set off on a track known as N-1. The remaining 10 cars were then switched southward a distance of approximately a quarter of a mile to the so-called Junction E area of the railroad of the petitioner where one car destined for delivery to The New York, Chicago and St. Louis Railroad Company was switched out and set off on a track known as the "M." Thereafter 4 of the remaining 9 cars, which were destined for delivery to The Pennsylvania Railroad Company, were switched to and set off on a track known as So-3. The remaining 5 cars, which were destined for delivery to The New York Central Railroad Company were then switched to another track known as So-2.

The 5 cars which had been set off first were later switched to various destinations as follows: two of the cars were switched to a track known as 3 North of No. 2 Open Hearth Plant of Bethlehem Steel Company and from there they were again switched to a track in that Plant; three of the cars were switched to other points for loading. The remaining 10 cars were switched as follows: One car was switched back, together with other cars, past the plant of Buffalo Sintering Company to the petitioner's Junction C and was ultimately delivered to The New York, Chicago and St. Louis Railroad Company; the 5 cars which had been shunted into So-2 for delivery to The New York Central Railroad became part of a cut of cars being built up from various points on petitioner's line for delivery to The New York Central Railroad and other line-haul carriers

for road movements; the 4 cars which had been shunted into So-3 for delivery to The Pennsylvania Railroad Company likewise became part of a cut of cars being built up from many points on petitioner's line for delivery to The Pennsylvania Railroad Company and other line-haul carriers for road movements by those carriers to points served by them.

The movement performed by petitioner which is referred to in the Sixth cause of action of the complaint herein was made on December 5, 1944, by a diesel electric switching locomotive and 15 cars from a point opposite the guard's building at Gate No. 3 of Bethlehem Steel Company to tracks adjacent to the plant of the Buffalo Sintering Company, a distance of approximately 2 miles. That locomotive was equipped with power driven wheel brakes and appliances for operating a train brake system. None of the cars had air brakes used and operated by the locomotive engineer. Said movement was made at an average speed of 5 miles per hour; no public streets, highways or tracks of other railroads were travelled upon or crossed at grade and visibility along the entire route was unobstructed. The only crossing at grade was one private industrial crossing owned by Bethlehem Steel Company, the use of which is restricted to that Company's employees and those to whom permission is given by it to pass in and out of its property; and such crossing is adequately protected.

The movement described in the preceding paragraph was a part of a switching movement made by those 15 cars for which petitioner was paid one switching charge per car. The 15 cars began their

movements from five separate points; 4 of them originated at three separate blast furnace plants of Bethlehem Steel Company; 6 of them originated at the Ore Screening Plant of that Company; the remaining 5 cars originated at an ore stock pile of that Company. From those points of origin they were, through various switching movements, switched into two groups of 10 and 5 cars respectively. The group of 10 cars was switched a distance of approximately one-quarter of a mile where the movement stopped to switch the group of 5 cars into the string. The string of 15 cars was then switched to a point described as Gate 4, where it stopped and from which it subsequently moved a distance of approximately 500 feet to a point near Gate 3, where it again stopped. From that point, which is the point at which the movement referred to in the preceding paragraph began, the cars were switched approximately 2 miles to the plant of Buffalo Sintering Company where they were switched and set off on various tracks at that plant. Before being placed for unloading they were switched to a track scale and weighed. After weighing, they were switched to various tracks for unloading.

POINT I

IN ORDER TO AVOID APPLICABLE AUTHORITIES, THE CIRCUIT COURT INDULGED IN ASSUMPTIONS NOT WARRANTED BY THE FACTS IN THE RECORD.

Respondent concedes that the air-brakes provisions of the Act are not applicable to switching movements (R. 16). This Court has consistently so ruled. *United States* v. *Erie Railroad Company,* 237 U. S. 402 (1915); *United States* v. *Chicago, Burlington and Quincy Railroad Company,* 237 U. S. 410 (1915); *Louisville & Jeffersonville Bridge Company* v. *United States,* 249 U. S. 534 (1919); *United States* v. *Northern Pacific Railway Company,* 254 U. S. 251 (1920).

The Trial Court concluded, as a matter of law, that the movements herein involved were switching movements. In reversing that conclusion, the Circuit Court said (R. 121):

> "This is a close case and the opinion and findings of Judge Knight who conducted the trial show a careful scrutiny, but after much deliberation *and not without some doubt* we feel obliged to differ with his conclusion that the defendant was not subject to the Safety Appliance Act in respect to the movements of the cars involved in the third and sixth causes of action." (Emphasis supplied.)

In resolving that doubt against petitioner and against the trier of the facts, the Circuit Court did not disagree with the facts found by the Trial Court, but indulged in certain assumptions which were completely unwarranted from the facts in the record.

The assumptions made by the Circuit Court go to the very heart of the issue at hand. The Circuit Court seems

to agree thoroughly with the Trial Court as to the facts and the law as applied to these facts. It is only enabled to disagree with the Trial Court by reason of those assumptions.

The Circuit Court in its opinion admits that

> "* * * the decisions we have relied upon involved * * * certain accompanying hazards on the route, which were somewhat different from and perhaps greater than those in the case at bar." (R. 124)

The greater hazards to which the Circuit Court referred were the existence of public grade crossings, grade crossings of other railroads, use of main-line tracks and the like, none of which is present in this case. Inasmuch as public grade crossings did not exist in this case, the Circuit Court assumed, and this seems to be the real basis of its reversal, that there is no essential difference between a public crossing and a private way (such as did exist in this case) and then added the further assumption that "a public crossing might have less traffic than the private one which intersected defendant's line." Both of those assumptions are totally unwarranted.

The importance of such assumptions to the Circuit Court's reversal becomes apparent when it is considered that this Court has said that hazards were what the Act was intended to avoid or minimize. *U. S.* v. *Chicago, Burlington and Quincy Railroad Company, supra.* The presence or absence of hazards which can be avoided or minimized by the application of the Act has been held in every reported case to be one of the chief tests of its applicability. We believe that the Circuit Court clearly erred in assuming facts not in the record in order to make applicable authori-

ties which, by its own admission, would otherwise be inapplicable.

The importance of that error is emphasized by the Trial Court's finding that such private crossing was "adequately protected."

In making such assumptions the Circuit Court has gone behind the findings of the Trial Court, all of which are based upon substantial evidence and not one of which has been attacked by respondent.

POINT II.

UNDER THE CONTROLLING AUTHORITIES THE MOVEMENTS INVOLVED IN THIS CASE ARE CLEARLY SWITCHING RATHER THAN TRAIN MOVEMENTS.

Under the cases involving facts similar to those in the instant case, the movements here involved are clearly "switching movements", rather than "train movements". The case which on its facts is the closest to the instant case is *United States* v. *Great Northern R. Co.*, 73 F. (2d) 736 (C. C. A. 9th, 1934).

That case was tried twice and appealed twice. In the opinion on the first appeal (*United States* v. *Great Northern Railway*, 68 F. (2d) 610 (C. C. A. 9th, 1934)), the only facts given were that the movement involved twelve cars drawn by a locomotive; covered slightly more than one and three-quarters miles; "involved no intermediate switching on the day in question"; and took place on a specified day in the "Seattle House Yard, an industrial district in the southern part of Seattle", Washington. On the first appeal, the appellate court reversed a judgment of the trial court for the defendant entered on a verdict of the jury, on

the ground that the trial court had improperly admitted evidence as to the danger involved in coupling the air hose between cars, the court stating that the requirements of the Safety Appliance Act were positive and absolute and that the question of the danger which might result from compliance with the statute was immaterial. The appellate court upheld a ruling of the trial court which admitted evidence on behalf of the Government indicating "that a number of streets and main line railroads were crossed by the switch engine and twelve cars", stating that "the 'hazards' attending a train movement constitute an element to be considered in applying the statute in question" and quoting the following statement from the *Erie* case, *supra*:

> "Thus it is plain that in common with other trains using the same main-line tracks, they were exposed to hazards which made it essential that appliances be at hand for readily and quickly checking or controlling their movements."

In the opinion on the second appeal (73 F. (2d) 736) the facts were stated to be as follows: The movement took place entirely within an area which, the opinion states, was designated in the exhibits on the trial as " 'Seattle House Yard', an industrial district in the southern part of Seattle", Washington. The track on which the movement took place was in the form of the letter U, with the open end of the U to the north and the curve to the south. On the day in question, one of defendant's switch engines, which was operated by a switching crew, started from a point adjacent to defendant's freight house, located in the northerly part of the above-mentioned yard (at the easterly point of the U), and moved southward, without any cars, down the easterly arm of the U, around the curve and

then northward, up the westerly arm of the U (which is referred to in the opinion as the "Fifth Avenue switching track") to the westerly point of the U, opposite the freight house. The switch engine then engaged in a series of switching movements, picking up cars at different points until it had assembled nine cars which it moved down to a point on the east side of the right-of-way on such westerly arm about one hundred feet north of the curve, where it left them standing. The switch engine then moved north again on the west side of such right-of-way and collected three other cars and moved them to the spot on which the original nine cars were standing and, after the twelve cars were coupled together, the movement complained of by the Government (and to which the Government unsuccessfully attempted to limit the court's attention) began. The engine and twelve cars moved around the curve and up the easterly arm of the U a distance of approximately one mile and one-half and stopped at a point near the freight house (from which the engine had started), where the movement complained of by the Government ended. However, the opinion indicates that, after stopping near the freight house, the engine switched out one of the twelve cars and then engaged in a further switching of cars, in the course of which another car was brought to and joined with the eleven cars remaining from the original group. The twelve cars were then coupled up, their air brakes connected, and what was referred to by the court as "the transfer" started for "the Great Northern yard" approximately six miles away.

The second trial resulted in a verdict for defendant and, on appeal, the judgment entered on the verdict was affirmed. Evidence on behalf of defendant as to the work customarily done in the yard on days other than the one in question had

also been received without objection, and the trial court had denied the Government's subsequent motions, first, that the evidence be stricken and, second, that the jury be instructed to disregard the evidence. With reference to such ruling the appellate court stated:

> "As indicated elsewhere in this opinion, appellant sought to select and segregate this single movement and separate it from its connection with the other operations then being engaged in by the crew, and without regard to the customary work ordinarily and generally being done in the house-yard, which would result in a distorted rather than a correct presentation of the nature of the work being done."

The appellate court on the second appeal also ruled that the trial court had properly admitted evidence "as to the inconvenience that might result from coupling up the air one day and leaving it uncoupled the next day, where sometimes there was immediate work to do and sometimes there was not", pointing out that, at the time the objection was made, "the court restricted the evidence" and advised the jury, in substance, that, while such inconvenience would be immaterial if the movement in question was a train movement, the inconvenience could "be taken into account by the jury as a circumstance bearing upon the question of whether this movement was a train movement or a switching operation." The appellate court further held that the trial court had properly instructed the jury as to the difference between a switching movement and a train movement, and had properly refused to direct a verdict in the Government's favor. The Government's motion for a directed verdict had been based upon a claim that a question of law

only was presented and, in ruling that such motion had been properly denied, the appellate court quoted a statement from another opinion to the effect that the "evidence permitted conflicting inferences". Applying the test as to "the essential nature of the work done", the appellate court stated, "the facts warranted the finding that the crew at the time was engaged in the assembly of cars by means of a series of switching movements, and that at the time complained of the cars had not been assembled into a train to be transferred as such to any particular point."

The following cases, three of which were relied on by the respondent in the instant case, were held by the appellate court to be distinguishable from the case then before it: *United States* v. *Southern Pacific Company*, 60 F. (2d) 864 (C. C. A. 9th, 1932); *Great Northern Railway Company* v. *United States*, 288 Fed. 190 (C. C. A. 8th, 1923); *Great Northern Railway Company* v. *United States*, 297 Fed. 692 (C. C. A. 9th, 1924); *United States* v. *Northern Pacific Railway Company*, 54 F. (2d) 573 (C. C. A. 9th, 1931).

The Circuit Court's disposition of petitioner's reliance on the foregoing case (*U. S.* v. *Great Northern Railway Company*, 73 F. (2d) 736) is clearly erroneous. It said in its opinion (R. 123) that "The case in the Ninth Circuit may be distinguished for the reason that a *consideration of all the movements involved* may show that they were essentially switching operations requiring the classification and assembling of cars to make up a train which were continued to some extent at least throughout the entire period." (Emphasis supplied.) Does the Circuit Court mean that it was improper for the Ninth Circuit to have considered "all the movements involved" in order to determine the nature of

a segment thereof of which the Government had complained? If so, it is diametrically opposed to the holding of the Ninth Circuit in that case to the effect that:

> "* * * The Government sought to establish a 'train movement' by presenting only a part of the work being done by the engine and crew, and disassociating it from the surrounding circumstances. Either the inspectors for the government were endeavoring to make an isolated movement, usually connected with other movements, come within the definition of a train movement, or they erroneously assumed that these cars had actually been assembled into a train unit for transfer to Interbay yard, some 6 miles distant. They also seemed to have incorrectly assumed, or left it to be inferred, that there was no more switching to be done before the train was made up that day.
>
> "Had the government inspectors continued to observe the engine and crew in order to ascertain the 'essential nature of the work being done,' they would have learned, as the undisputed testimony shows, that after the engine had transported the cars to the point where the inspectors had discontinued their observations, the switching of cars was resumed; one of the cars which had been assembled with the others was disconnected and delivered to another place, the engine and crew then went elsewhere and brought a car of merchandise, which was then placed with the other cars, and the train made up; the air brakes were then connected and the cars went into a train movement to the Great Northern yards, located at Interbay, 6 miles distant."

"No court," stated the Ninth Circuit on the second appeal, "has gone to the extent of sustaining the position taken by the government in this case."

The Trial Court in this case followed the Ninth Circuit in that respect in refusing the request of the respondent to limit the Trial Court to the consideration of small segments of the full movements involved. Furthermore, the Circuit Court's attempted distinction of the Ninth Circuit case becomes more incomprehensible by reason of the fact that it not only did not set aside the findings of the Trial Court setting forth the full movements involved in this case (Findings 14 to 17) but adopted them by stating (R. 118): "Findings 14, 15, 16 and 17 describe the movements upon which our discussion whether they are train or switching movements must depend and are set forth in the margin." Thus, it appears that the Circuit Court has taken opposite positions with respect to the same case in its attempt to distinguish one of the two cases upon which the petitioner places reliance.

Concerning the other case relied upon by petitioner (*United States* v. *New York, Chicago and St. Louis Railway Company,* 77 F. (2d) 215 (C. C. A. 7th, 1935)), the Circuit Court said (R. 123): "We can not reconcile [it] with the opinions of the Supreme Court we have mentioned." (i.e., *Louisville & Jeffersonville Bridge Co.* v. *United States,* 249 U. S. 534, and *United States* v. *Northern Pacific Railway Company,* 254 U. S. 251).

Again, the Circuit Court's attempted distinction is incomprehensible. In the *New York, Chicago and St. Louis* case, which the Circuit Court attempted to distinguish, the Seventh Circuit said that the *Louisville & Jeffersonville Bridge* case more closely resembled the case before it, in so far as the facts were concerned, than any other case decided by the Supreme Court but it distinguished the two cases by pointing out that in the case before it, as in the instant

case, the movement "* * * was entirely within a single yard (the yard being one devoted exclusively to movements of freight cars), and was on side tracks, except for crossing the main track at one point."

The Circuit Court relies upon *United States* v. *Northern Pacific Railway Company*, 254 U. S. 251 as well as upon the *Louisville & Jeffersonville Bridge* case. In the *Northern Pacific* case this Court, in deciding against the defendant railroad, relied upon the following facts, none of which are present in the instant case (and all of which related to hazards of the type referred to in *U. S.* v. *Erie Railroad Company, supra*): (1) that the road crossed at grade two streets, on one of which street cars ran; (2) that the road crossed at grade, at five places in all, lines of three independent railway companies, which ran freight trains, and one of which also ran passenger trains, across defendant's track; (3) that two other independent companies used about a mile of such track as part of their freight lines; and (4) that trains were run by the defendant on the track in question at speeds varying from three to eighteen miles per hour. Most important is the fact that this Court expressly stated (p. 253) that "These four miles of railroad owned by the Northern Pacific are not used by it for switching or assembling cars."

Thus, it appears that the Circuit Court's attempted distinction of the *Great Northern* and *New York, Chicago and St. Louis Railway* cases is without substance and that the truth of the matter is that the Circuit Court, in holding as it did in the instant case, is in direct conflict with the Seventh and Ninth Circuits.

POINT III

IF THE CIRCUIT COURT'S DECISION IS ALLOWED TO STAND UNCORRECTED IT WILL SERIOUSLY HAMPER RAILROAD OPERATIONS GENERALLY.

On its face, this action is nothing more than one to collect penalties amounting to $200 for alleged violations of the Act. In fact, however, its effect is of far-reaching importance. If movements of the type involved in this action are held to be subject to the Act then it is submitted that there is scarcely any movement that may be made by any railroad that will be beyond the reach of the Act. Thus, there will be destroyed the well settled principle established by this Court, that there is a large body of railroad movements to which the Act was never intended to apply.

The Trial Court has held upon sound authority that the air brake provisions of the Act were designed to eliminate certain hazards necessarily incident to certain railroad operations. There is a twofold reason why the courts have held that such provisions are not applicable to switching movements. First, because the hazards at which the air-brake provisions are aimed are not present in such movements; second, because such hazards are absent, the application of the provisions to such movements will only result in harm in that it will hamper the movements and thus substantially increase the cost of switching operations. It is for those reasons, therefore, that the courts, in determining whether a particular movement was a train or a switching movement, have thought it important to consider whether the movement did or did not take place entirely within the defendant's own yard, whether in making the movement a main line was or was not used, and whether tracks of other railroads and public highways were or were not crossed at grade and so forth. The presence of such

factors may create hazards not usually incident to switching operations and which, therefore, may bring the Act into play.

In all of the cases which have been, or could be, relied upon by the respondent the movements crossed or made use of a trunk main-line or crossed public highways or railroad tracks at grade. For that reason the courts held that despite the presence of many factors ordinarily unique to switching operations the movements were subject to the Act. In the instant case it is submitted that the evidence supports the Trial Court's holding that all the indicia of switching operations are present, that all the indicia of train operations are absent and that there exists none of the hazards which in other cases have been held to bring the Act into play. For that reason, the plea made by the respondent in the Courts below for a "humane" interpretation of the Act is out of place.

None of the reported suits by the United States involving alleged violations of the air-brake provisions of the Act has ever been brought against a switching carrier such as petitioner. Inasmuch as trunk line carriers and carriers whose operations are not exclusively switching perform both train and switching services, it is readily understandable that at times the border line between such services may not be sharp and well defined and therefore subject to dispute. There seems, however, little room for such dispute when the carrier is nothing more than a switching carrier.

Judge Knight, in his opinion in this case aptly and succinctly stated the true purpose of the Act when he said (R. 93-94):

> "* * * It was never contemplated that the railroads should be compelled to provide and use operational facilities such as those claimed to be lacking here

> to insure the safety of individuals in strictly switching operations. Hazard is what Congress sought to lessen. It was not intended to burden railroads with some operational acts wholly unnecessary."

The burden referred to by Judge Knight is a real one. Switching movements are short movements with small numbers of cars. The essential purpose of such movements is to build up or break down larger cuts of cars. The constant coupling and uncoupling of air-brake hoses, pumping up air and other items incident to air-brake operation on movements of that nature is both time consuming and expensive. To apply the Act to such movements is to cast upon them an undue burden. The expense created by that burden must ultimately be borne by the public.

Conclusion

In construing the record in the light of unwarranted assumptions and in misconstruing authorities which should have been applied to the facts in the record, the Circuit Court committed error so serious as to call for the interposition of the corrective jurisdiction of this Court by writ of certiorari. Furthermore, the review of this Court seems to be called for by the doubt expressed by the Circuit Court as to the correctness of its own decision (R. 121).

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v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 90-98) is reported at 71 F. Supp. 461. The findings of fact and conclusions of law of the District Court appear at R. 98-105. The opinion of the Court of Appeals (R. 116-123) is reported at 168 F. 2d 948.

JURISDICTION

The judgment of the Court of Appeals was entered June 30, 1948 (R. 124). The petition for a writ of certiorari was filed September 28, 1948.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether a two-mile haul by a locomotive of 15 freight cars as a unit, during which no cars are picked up or set out en route and the movement is uninterrupted, is a train movement within the requirement of the Safety Appliance Act that a minimum percentage of cars in a train have power or train brakes subject to the control of the engineer.

STATUTES AND REGULATION INVOLVED

The Act of March 2, 1893, c. 196, 27 Stat. 531, commonly known as the Safety Appliance Act, provides in pertinent part:

> [Sec. 1 (45 U.S.C., 1946 ed., 1)] * * * it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system, or to run any train in such traffic * * * that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.
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> Sec. 6 [45 U.S.C., 1946 ed., 6]. * * * any such common carrier using any locomotive engine,

running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed * * *.

* * * * *

The Act of March 2, 1903, c. 976, 32 Stat. 943, amending the 1893 Act, provides in pertinent part:

* * * * *

Sec. 2 [45 U.S.C., 1946 ed., 9]. * * * Whenever, as provided in said Act [of March 2, 1893, *supra*], any train is operated with power or train brakes, not less than fifty per centum of the cars in such train shall have their brakes used and operated by the engineer of the locomotive drawing such train; and all power-braked cars in such train which are associated together with said fifty per centum shall have their brakes so used and operated; and, to more fully carry into effect the objects of said Act, the Interstate-Commerce Commission may, from time to time, after full hearing, increase the minimum percentage of cars in any train required to be operated with power or train brakes which must have their brakes used and operated as aforesaid; and failure to comply with any such requirement of the said

> Interstate-Commerce Commission shall be subject to the like penalty as failure to comply with any requirement of this section.
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> * * * * *

An order of the Interstate Commerce Commission, dated June 6, 1910 (49 C.F.R. 132.1), provides:

> On and after September 1, 1910, on all railroads used in interstate commerce, whenever, as required by the Safety Appliance Act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 percent of the cars of such train shall have their brakes used and operated by the engineer of the locomotive drawing such train, and all power-brake cars in every such train which are associated together with the 85 percent shall have their brakes so used and operated.

STATEMENT

Pursuant to Section 6 of the Safety Appliance Act of March 2, 1893 (*supra,* pp. 2-3), the United States filed a complaint (R. 3-11) in the District Court for the Western District of New York charging petitioner, a common carrier engaged in interstate commerce by railroad, with violations of certain safety appliance provisions of that Act, as amended, and asking judgment in the sum of $100 for each violation. Ten violations were alleged, but only two, the third and the sixth, are here involved, the other eight causes of action, or counts, having been disposed of by confession of judgment (R.

13-14). In the third cause of action (R. 5-6), it was alleged that petitioner, on December 4, 1944, operated over its line of railroad, from Buffalo, New York, to Lackawanna, New York, a train consisting of a locomotive and 15 cars, the brakes in only ten of which cars (less than 85%) were used and operated by the engineer of the locomotive, in violation of Section 2 of the Act of March 2, 1903 (*supra,* pp. 3-4), as modified (pursuant to authority conferred by the section) by the order of the Interstate Commerce Commission of June 6, 1910 (*supra,* p. 4). The sixth cause of action (R.7-8)charged that petitioner, on December 5, 1944, operated from Lackawanna to Buffalo a train consisting of a locomotive and 15 cars, the brakes in none of which cars were used and operated by the engineer of the locomotive, in violation of the same provisions of law.

Petitioner admitted the interstate character of its business, but otherwise denied the allegations of the third and sixth causes of action (R. 12.) Following a trial before a judge, a jury having been waived, judgment was entered for petitioner (R. 105), the court finding that the movements involved were "switching movements and not train movements," and hence not subject to the provisions of law alleged to have been violated (R. 104). On appeal by the United States to the Court of Appeals for the Second Circuit, the judgment of the district court was reversed (R. 124) on the ground

that in each instance the movement in question was "a transfer of cars from one switching point to another and itself is a train movement * * * rather than a switching operation" (R. 120).

The controlling facts, which are not in dispute, are summarized in the following excerpt from the opinion of the district court (R. 92-93; see also the court's numbered finding of facts, R. 98-104):

> The third cause of action relates to the movement by the defendant in the afternoon of December 4, 1944, of a cut of cars consisting of 15 freight cars drawn by its yard engine from a point opposite the Buffalo Sintering Corporation buildings, at Buffalo, N. Y., to the yard near the Bethlehem Steel Company's plant at Lackawanna, a distance of about two miles. It is not denied that only the first ten cars, or less than 85% of the total 15, had their air brakes used and operated by the locomotive engineer. No cars were picked up or set out en route.
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> The sixth cause of action involves an operation in the afternoon of December 5, 1944, of another cut of cars also consisting of 15 freight cars and drawn by a yard engine in direction reverse from that described in the third cause of action, *i.e.* from opposite the police guard building at Lackawanna to defendant's Marilla Street yard opposite the Buffalo Sintering plant. It is not denied that none of these cars had their air brakes used and operated by the engineer; that no cars were picked up or set out in the movement, and in the move-

ment defendant passed over one private highway crossing at grade.[1]

In both instances the cars were assembled at one point in defendant's yard and removed intact to another point in the yard over a single track line connecting these points.[2] It seems to be undenied that the defendant's whole system includes only a single yard.[3]

The undisputed facts are that switching cars is the sole business of the defendant; its trains are used only in switching service; its entire equipment, with possible exception of a few cars, is suitable only for use in switching service; no public streets, highways or tracks of other railroads are crossed at grade in any of the movements complained of herein, except one private industrial crossing owned by the Bethlehem Steel Company and restricted in its use to the latter's employees and others to whom permission is given by such company to pass into the Company's property; these movements on the track are effected by switching engines; they are under the supervision and

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[1] This private highway crossing was also crossed, according to the undisputed evidence, in the movement of December 4, 1944, involved in the third cause of action (R. 20, 25).

[2] According to the undisputed evidence (see findings of fact 15 and 17, R. 101-102, 103-104), the movements in controversy were preceded and followed by switching operations; *i.e.*, in each instance, the 15-car train was made up by assembling cars from various locations, and was subsequently broken up by setting the cars off at various other locations.

[3] This is not accurate, though the point is not considered relevant; according to the Government's witnesses, I.C.C. inspectors with more than 30 years' railroad experience (R. 17-18, 26), the terminal points of the movements in issue were in separate yards of petitioner (R. 20, 28-29).

control of the yard master and crews; the movements are not made under train order or time table schedules; there is no block system; the movements are made at slow speed[4] during which a member of the crew is stationed at the forward end of the locomotive in order to watch the track ahead.

ARGUMENT

It is well settled that the requirement of the Safety Appliance Act, as amended and modified, *supra,* pp. 2-4, that not less than 85% of the cars of a train be equipped with power brakes under the control of the engineer, applies only to true train movements and not to "mere switching operations." *United States* v. *Northern Pacific Ry. Co.,* 254 U. S. 251, 254-255; *Louisville & Jeffersonville Bridge Co.* v. *United States,* 249 U. S. 534, 537-540; *United States* v. *Chicago, Burlington & Quincy R. R.,* 237 U. S. 410, 412-413; *United States* v. *Erie R. R.,* 237 U. S. 402, 406-408. The difference between a train movement and a switching operation is generally clear, but it is evident that there is a middle ground in which it is difficult to draw the line between the two types of operation. In this case, the district court, accepting petitioner's contention, held the movements in controversy to be

[4] The average speed of both movements in question was approximately five miles per hour (R. 101, 103). The movements were not, however, on level ground. Approximately one mile of the distance traversed in each movement consisted of a grade, described as "very heavy" by a government witness (R. 27) and as "slight" by a defense witness (R. 62).

mere switching operations. The Court of Appeals drew the contrary conclusion from the same facts, and accepted the Government's contention that the movements were true train movements. Since the controlling facts are not in dispute and the issue is essentially legal rather than factual, the Court of Appeals was, of course, in as good a position as the district court to make the legal determination. We submit that the Court of Appeals' decision that the movements were train movements rather than switching operations is clearly correct under the decisions of this Court.

Petitioner points to numerous factors which, it contends, show that the movements in question must be considered as mere switching operations (Pet. 6-11). Thus, it argues, it is "wholly within the Buffalo Switching District"; its services are limited to "switching services" in an area six miles long by three miles wide; it is classified for accounting purposes as a switching carrier; all of its crews are yard crews; through trains do not pass over its tracks; none of its movements is made under train orders or on time-table schedules; no public streets or other railroad tracks were crossed in the two movements in question; the average speed in each instance was only five miles per hour; visibility along the entire route was unobstructed; payment was received for the operations on the basis of one switching charge per car; the cars involved in each operation were assembled from various points prior

to the commencement of the run in issue, and at the end of the run were cut out and set off on various tracks; etc.

We submit, however, that such factors as those enumerated are not relevant to the issue of whether the movements in question were train movements or "mere switching operations." Indeed, the fact that true switching operations preceded and followed the movements in controversy serves but to emphasize the different nature of the latter as true train movements. The controlling fact in this case is that in each instance there was a two-mile haul by a locomotive of 15 cars as a unit, during which no cars were picked up or set out en route and the movement was uninterrupted. Under the decisions of this Court, these movements were train movements within the meaning of the provisions of law involved.

In *Louisville & Jeffersonville Bridge Co.* v. *United States,* 249 U. S. 534, at 538, the Court said:

> An engine and twenty-six cars, assembled and coupled together, not only satisfies the dictionary definition of a "train of cars," but would certainly be so designated by men in general and in any fair acceptation of the term must be regarded as constituting a train within the meaning of the statute. It was a train greater in length than most regularly scheduled trains were when this Safety Appliance Act was passed twenty-six years ago, and even yet, probably, exceeds in length, pas-

> senger and freight trains considered, more than a majority of the regular road trains in this country.
>
> The work done with the cars, as described, was not a sorting, or selecting, or classifying of them, involving coupling and uncoupling, and the movement of one or a few at a time for short distances, but was a transfer of the twenty-six cars as a unit from one terminal into that of another company for delivery, without uncoupling or switching out a single car, and it cannot, therefore, with propriety be called a switching movement.[5]

And in *United States* v. *Northern Pacific Ry. Co.*, 254 U. S. 251, at 254-255, the Court said:

> * * * A moving locomotive with cars attached is without the provision of the act [Safety Appliance Act] only when it is *not* a train; as where the operation is that of switching, classifying and assembling cars within railroad yards for the purpose of making up trains. * * *.

To the same effect, as to what constitutes a train movement as distinguished from a switching operation, see *United States* v. *Chicago, Burlington & Quincy R. R.*, 237 U. S. 410, 412, and *United States* v. *Erie R. R.*, 237 U. S. 402, 407-408.[6]

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[5] The distance traversed in that case was only three-quarters of a mile. In the present case, it was nearly two miles.

[6] See also *United States* v. *Southern Pacific Co.*, 100 F. 2d 984 (C.C.A. 9), certiorari denied, 307 U. S. 633; *United States* v. *Southern Pacific Co.*, 60 F. 2d 864 (C.C.A. 9), certiorari denied, 287 U. S. 667; *United States* v. *Northern Pacific Ry. Co.*, 54 F. 2d 573 (C.C.A. 9); *Chicago, St. Paul, M. & O. Ry. Co.* v.

It is true, as observed by the Court of Appeals (R. 122), that these decisions "involved not only the transfer of cars as a single unit but also certain accompanying hazards on the route, which were somewhat different from and perhaps greater than those in the case at bar." [7] But it is clear that the degree of the danger resulting from failure to comply with the mandatory requirements of the law has not been considered by this Court as relevant. "Congress has not imposed upon courts applying the act any duty to weigh the dangers incident to particular operations; and we have no occasion to consider the special dangers incident to operating trains under the conditions here presented." *United States* v. *Northern Pacific Ry. Co., supra,* at 255.[8] In any event, as the Court of

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United States, 36 F. 2d 670 (C.C.A. 8); *Chicago & Erie R. Co.* v. *United States,* 22 F. 2d 729 (C.C.A. 7); *Illinois Central R. Co.* v. *United States,* 14 F. 2d 747 (C.C.A. 8), certiorari denied, 273 U. S. 752; *Great Northern Ry. Co.* v. *United States,* 297 Fed. 692 (C.C.A. 9); *Great Northern Ry. Co.* v. *United States,* 288 Fed. 190 (C.C.A. 8); *United States* v. *Galveston, H. & H. R. Co.,* 255 Fed. 755 (C.C.A. 5); *United States* v. *Northern Pacific Ry. Co.,* 72 F. Supp. 528 (D. Minn.).

[7] In the *Louisville & Jeffersonville Bridge Co.* case, the movement in question involved crossing, at grade, three city streets once, two streets twice, one street three times, and a main track movement of 2600 feet (249 U. S., at 538); in the *Northern Pacific Ry. Co.* case, the movement was across two streets and the lines of three independent railroad companies, one of which was a passenger-train track (254 U. S., at 253); in the *Chicago, Burlington & Quincy R. R.* case, the movement was partly along a main-line track accommodating passenger and freight trains (237 U. S., at 411); and in the *Erie R. R.* case, the movement crossed passenger train tracks and was partly along a main-line freight-train track (237 U. S., at 405).

[8] Compare: "But the construction which the act should receive is not to be found in balancing the dangers which

Appeals further observed (R. 122-123), there is "no essential difference * * * between a public crossing and the private way in the present case; indeed, a public crossing might have less traffic than the private one which intersected defendant's line. * * * Nor is it reasonable to say that the existence of more than one crossing is necessary in order to create sufficient hazards to render the Act applicable. We think it undesirable for the courts by their decisions to enable railroads to eliminate safety appliances where hazards undoubtedly exist to some substantial degree and where the use of such appliance[s] would insure increased protection. In the record before us there was testimony by an experienced interstate commerce inspector [see R. 20] that the crossing and the existing grade at that point rendered the absence of air brakes dangerous. We can discover nothing in the testimony to justify a contrary conclusion unless it be the slow speed of the freight cars which were found to run at an average of five miles an hour; but there might be a higher speed on particular occasions."

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would result from obeying the law with those which would result from violating it, nor in considering what other precautions will equal, in the promotion of safety, those prescribed by the act. Such considerations were for Congress when enacting the law and it has repeatedly been held by this court that other provisions of the Safety Appliance Act impose upon the carrier the absolute duty of compliance in cases to which they apply and that failure to comply will not be excused by carefulness to avoid the danger which the appliances prescribed were intended to guard against, nor by the adoption of what might be considered equivalents of the requirements of the act." *Louisville & Jeffersonville Bridge Co.* v. *United States*, *supra*, at 539.

Petitioner (Pet. 14-20) heavily relies on *United States* v. *Great Northern Ry. Co.*, 73 F. 2d 736 (C.C.A. 9), certiorari denied, 295 U. S. 752, where it was held, one judge dissenting, that a 1½-mile haul of twelve cars, with no setting out or picking up of cars en route, was a mere switching operation. The evidence in that case showed that, after the run in question, one of the twelve cars was set off and another substituted, following which the air brakes were connected up and the train proceeded another six miles. The court thought that this latter evidence indicated that the 1½-mile run was essentially a switching operation. The decision, however, cannot be reconciled with the decisions of this Court, discussed above, and, indeed, cannot be reconciled on any valid basis with prior and subsequent decisions of the same court. See *United States* v. *Southern Pacific Co.*, 60 F. 2d 864 (C.C.A. 9), certiorari denied, 287 U. S. 667, and *United States* v. *Southern Pacific Co.*, 100 F. 2d 984 (C.C.A. 9), certiorari denied, 307 U. S. 633.[9] It must be regarded, therefore, as inconsistent with the decisions of this Court, those of other Courts

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[9] In the *Southern Pacific Co.* case reported at 100 F. 2d 984, the Ninth Circuit attempted to distinguish its *Great Northern Ry. Co.* decision on the ground that in the latter case "the movement complained of took place entirely within the railroad yard, where no problem of avoiding interference in the use of tracks by speedy main line train movements could be encountered" (100 F. 2d, at 988). But in *United States* v. *Northern Pacific Ry. Co.*, 254 U. S. 251, 254, this Court had pointed out that "there is nothing in the act which limits the application of the provision here in question to operations on main line tracks."

of appeals (see not 6, *supra*, pp. 11-12), and prior and subsequent decisions in the same circuit. The other decision relied on by petitioner (Pet. 20-21), *United States* v. *New York, Chicago & St. L. Ry. Co.*, 77 F. 2d 215 (C.C.A. 7), involved a non-continuous movement featured by several stoppings and startings and opening and closing of switches, in which the engine was backing up throughout. In the case at bar, on the other hand, the trip was a continuous and uninterrupted haul of nearly two miles. The distinction between the movements seems apparent.

CONCLUSION

The decision below involved merely the application, in a specific factual situation, of principles laid down by numerous decisions of this Court, and is in accord with those decisions. There is, moreover, no real conflict among the circuits. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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